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No. 06-1542

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHARLES A. NICHOLS,

Petitioner,

v.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Charles Nichols has presented compelling reasons to grant the Petition, when the decision of the Colorado Court of Appeals, affirming the district court's entry of judgment in accordance with the jury's answers to *all* of the questions on the verdict form, does not conflict with a decision of this Court, any other federal court or state court, nor implicate a substantial question which has not been settled in the federal courts.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

On January 20, 2005, Respondent Burlington Northern and Santa Fe Railway Company filed a Restated Certificate of Incorporation with the Secretary of State of the State of Delaware officially changing its name to BNSF Railway Company. The parent company of BNSF Railway Company is Burlington Northern Santa Fe Corporation, which owns one hundred percent of the stock of BNSF Railway Company.

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INTRODUCTION

Charles Nichols has presented no compelling reason for this Court to grant his Petition for a Writ of Certiorari (the "Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the opinion of the Colorado Court of Appeals conflicts with a decision of this Court, any other federal court or state court, or that the Court of Appeals decided a question of substance which has not been settled in the federal courts. *See* Sup. Ct. R. 10(a)-(c).

Although Nichols argues that the damages in a case arising under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51, may not be reduced in the proportion attributed by the jury to the plaintiff's pre-existing condition, it is settled law in FELA jurisprudence that the railroad is not liable for damages caused by the plaintiff's pre-existing condition. In fact, the jury was instructed regarding the apportionment of damages to a pre-existing condition, and Nichols admits that the jury was properly instructed. (Petition at 7-8). Nor does *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003) alter this principle. *Ayers* did not involve the aggravation of a pre-existing condition and its holding cannot be extended to the aggravation of a pre-existing condition. The only other courts to consider this question reached the same conclusion as the court below.

Throughout the Petition Nichols weaves a subliminal argument that the questions on the verdict form were unclear or confusing. Nichols does not present this issue directly for review because he did not preserve it below. Before the verdict form was given to the jury, Nichols did not object to the wording of the questions on it. After the jurors returned their verdict and before they were discharged, he did not

object that their answers were unclear. He therefore failed to preserve any objection to the wording of the verdict form or the clarity of the jury's answers.

"A Petition for Writ of Certiorari is rarely granted when the asserted error consists of ... the misapplication of a properly stated rule of law." Rule 10, Supreme Court Rules. Nichols concedes that the trial court properly instructed the jury regarding the apportionment of damages to a preexisting condition in a FELA case. He argues instead that the trial court misunderstood the jury's answers to questions on the special verdict form when entering judgment. Whether the verdict form is clear; whether Nichols preserved his argument that it is not; and whether the courts below correctly understood the jury's answers are not matters of national import but are matters the Court would need to address if the Petition were granted. The courts below having properly stated the controlling law, this case presents no issue worth review.

STATEMENT OF FACTS

A. Nichols' Pre-Existing Medical Conditions

Charles Nichols has had bipartite patella (a genetic failure of the kneecap to fuse properly) in both knees for over thirty years. (Brucker Dep. at 37:8-18; 38:20-25; 55:2-11). Bipartite patella is painful, and Nichols has had pain his knees. (*Id.* at 40:10-41:13; 43:24-44:3). In fact, he describes this condition as a broken kneecap. (*Id.* at 42:24-43:23; 55:12-56:7; Tr. 9/16 at 65:20-66:1).

Nichols also has degenerative disc disease in his spine, a progressive condition which causes slow but definite

deterioration of the disc spaces over time. (Tr. 9/16 at 32:20-25; 33:21 – 34:3; 45:10-17). Nichols is now over 45 years old, and his lumbar spine or lower back has undergone degenerative changes consistent with someone his age. (Brucker Dep. at 63:1-3; Khan Dep. at 3:5-5:2; 11:12-19; Tr. 9/17 at 48:3-24; 96:22-25). The degenerative changes in Nichols' lumbar spine can cause low back pain, and Nichols had low back pain for many years. (Khan Dep. at 8:24-9:8; Tr. 9/17 at 57:19 – 58:2; 94:17 – 95:2).

Nichols also has a genetic predisposition to develop "Schmorl's nodes" in his spine, a condition which can cause back pain. (Kahn Dep. at 5:24-6:16; 6:5-10; 11:20-12:23; 13:5-9; Tr. 9/17 at 97:1 – 98:4; 98:9-13). Nichols' spine has noticeable Schmorl's nodes. (Tr. 9/17 at 48:10-20; Khan Dep. at 5:24-6:1; 11:20-22; Tr. 9/16 at 18:7 – 10; 34:8-10). Nichols most likely had these Schmorl's nodes "for a long time prior" to 1999. (Tr. 9/16 at 33:4-7; 34:14-18).

Nichols also has osteophyte formations in his spine, a condition which again is related to the aging process. (Khan Dep. at 7:9-8:4; Tr. 9/16 at 34:19-23). Nichols most likely had these osteophytes before 1999. (Tr. 9/16 at 19:20 – 35:3). Degenerative disk disease, Schmorl's nodes and osteophyte formations can all cause lower back pain. (Khan Dep. at 8:24-9:8).

B. The Accident and Lawsuit

On November 7, 1999, as Nichols was climbing aboard a locomotive, he felt a severe tingling sensation in his right hand, as though it were asleep. (Tr. 9/16 at 93:14-23; 95:5 – 96:3; 96:19-97:6). He then lost his grip and fell, injuring his right knee. (*Id.* at 96:15 – 98:3; 100:9 – 101:1). After the

accident, Nichols was treated by Dr. Wallace Brucker for his knee injury. (*Id.* at 109:5-7; Brucker Dep. at 8:16-10:6). Nichols continues to have pain in his knee and lower back. (Tr. 9/16 at 15:21 – 16:6; 110:17-22).

Nichols filed suit in Colorado state court against the Burlington Northern Railway Company ("BNSF") under FELA, asserting two claims. (*See* Pld. 1 at pp.1-5). The first claim was for the "neck strain and injury" allegedly caused by repeated trauma in Nichols' work as an engineer. The second claim was for the injury to his right knee and lower back caused by his fall from the locomotive. (*Id.* at p.2). Nichols alleged that BNSF assigned him to work which was likely to "aggravate any pre-existing condition which may have been present in [his] body." (*Id.* at p.3, ¶¶ IV(e) and (k); *see also* p.4, ¶ VI). As an affirmative defense, BNSF alleged that "Plaintiff's injuries or conditions pre-existed the incidents alleged in his Complaint." (*Id.* at p.7, sixth affirmative defense). After the parties settled Nichols' claims for injury to his neck and arms, only the claim for injury to his right knee and lower back remained. (Pld. 3 at p.577, ¶¶ 2, 3).

At the conclusion of trial, the court found sufficient evidence to support an instruction on aggravation of pre-existing conditions, and Nichols agreed. (Tr. 9/18 at 16:18-24). After deliberating for almost four hours, the jury found that both BNSF and Nichols were negligent; that Nichols' negligence caused thirty percent of his claimed injuries; that $800,000 would fairly compensate Nichols for his claimed injuries; and that seventy percent was attributable to his pre-existing conditions. (Pld. 6 at pp.1391-1392; Tr. 9/18 at 112:8 – 113:9). The judge read the verdict aloud, polled the jury, accepted the verdict pursuant to Rule 47, C.R.C.P., discharged

the jury, and gave the parties one day to file briefs concerning the judgment to be entered. (Tr. 9/18 at 113:14 –117:25; 120:9-121:6).

In his brief regarding entry of judgment, Nichols asserted (for the first time) that Question 7 on the verdict form was ambiguous and should have been explained to the jury. (Pld. 5 at pp.1336-1339). Nichols further asserted that the jury's responses were only "informative" and not intended to provide the basis for judgment. (*Id.* at p.1339). The trial court rejected these arguments and entered judgment against BNSF for almost $165,000 in accordance with the jury's answers to *all* of the questions on the verdict form. (Pet. App. at 1a). The Colorado Court of Appeals affirmed the judgment, and the Colorado Supreme Court declined review. (Pet. App. at 7a and 20a). Since then, BNSF has paid the full amount of the judgment, plus interest, into the registry of the trial court, where Nichols may access it at any time, and the trial court has entered an order directing satisfaction of the judgment.

REASONS FOR DENYING THE PETITION

I. FELA ALLOWS THE APPORTIONMENT OF DAMAGES TO A PRE-EXISTING CONDITION.

FELA is "founded on common law concepts of negligence and injury, subject to such qualifications as Congress" has declared. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). "*Only* to the extent of these *explicit statutory alterations* is FELA 'an avowed departure from the rules of the common law'." *Id.* at 544. Nothing in FELA alters the common law principle regarding the apportionment of damages to a pre-existing condition, and it is well established that this principle is followed in FELA cases.

Stevens v. Bangor and Aroostook Railroad Co., 97 F.3d 594, 598 (1st Cir. 1996); *Sauer v. Burlington Northern Railroad Co.*, 106 F.3d 1490, 1493-1495 (10th Cir. 1996).

A federal pattern jury instruction designed for use in FELA cases states this principle. 3A O'Malley, Grenig & Lee, *Federal Practice and Jury Instructions – Civil* (5th Ed. 2001) at § 155.65 (hereafter "*O'Malley*"). The jury here was given this instruction (Pet. App. at 52a, Instruction No. 28; Pld. 3 at p.1371; Tr. 9/18 at 70:20-71:17), and Nichols agrees that the jury was properly instructed. (Petition at 7-8). The Colorado Court of Appeals therefore properly rejected the assertion that FELA does not allow the apportionment of damages to a pre-existing condition. (Pet. App. at 10a-12a).

II. *AYERS* DOES NOT ALTER THIS PRINCIPLE.

Nichols argues *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003) supports his conclusion that FELA does not allow the apportionment of damages to a pre-existing condition. (Petition at 18-19). Again, the Court of Appeals properly rejected this argument as wrong as a matter of law. (Pet. App. at 12a).

Ayers did not involve a claim for damages caused by the aggravation of a pre-existing condition. Rather, the issue in *Ayers* was whether a railroad is responsible for the full amount of harm caused by the combined negligence of the railroad and other entities. 538 U.S. at 140. This Court concluded that the railroad should be liable for the full amount of harm, resting this conclusion principally on two grounds: the history of "consistent judicial applications of the Act"; and the ability of the railroad to recover from third parties the proportion of damage they caused. *Id.* at 162-

165. A review of these factors here leads to the conclusion that *Ayers* does not alter the common law principle regarding the apportionment of damages based on the aggravation of a pre-existing condition, as three courts across the country (including the court below) have found.

First, in *Ayers* this Court found "significant" the "paucity of lower court authority for the proposition that FELA contemplates apportionment" to third parties. *Id.* at 162. In contrast here, the apportionment of damages to a pre-existing condition in FELA is well established. Recognizing that FELA departs from the common law "*only* to the extent of [the] explicit statutory alterations" contained in it, and further recognizing that nothing in FELA explicitly alters the common law principle regarding the apportionment of damages to a pre-existing condition, this principle survived the enactment of FELA.

Second, this Court in *Ayers* repeatedly emphasized that a railroad held liable for the full amount of harm caused by itself and third parties could recover the proportion of damages it did not cause through an action for contribution or indemnity. 538 U.S. at 162-165. That avenue of relief is not available when the harm is in part the result of a pre-existing condition, as the court noted in *Meyer v. Union Pacific Railroad Co.*, 865 A.2d 857 (Pa. Super. Ct. 2004).

In *Meyer*, the Pennsylvania Superior Court held that the trial court in a FELA case must instruct the jury regarding the apportionment of damages to a pre-existing condition and explained that *Ayers* has no relevance to this issue:

> Madame Justice Ginsberg's learned opinion [in *Ayers*] did not address whether a plaintiff's

> pre-existing condition was apportionable under FELA, the controlling issue in the instant case, nor did she discuss other federal cases dealing with this issue. *E.g. Sauer* . . . * * * . . . the issue before the *Ayers* Court related to a third-party's concurrent negligence rather than a plaintiff – employee's pre-existing condition.
>
> * * *
>
> Moreover, since the *Ayers* Court continued to recognize an employer's right to seek contribution or indemnification from concurrently liable third parties, *Ayers* does not naturally extend to cases involving pre-existing conditions. If we were to extend *Ayers* to these cases, employers would lack any recourse to recoup losses incurred by satisfying damage awards for injuries that were caused solely by a pre-existing condition.

Id. at 865-866. The decision in *Meyers* demonstrates that *Sauer*, and not *Ayers*, answers the question of how to apportion damages to a pre-existing condition in a FELA case, as the Court of Appeals here properly found. (Pet. App. at 12a).

The Court of Appeals' decision is consistent with both *Meyers* and *Rust v. Burlington Northern and Santa Fe Railway Co.*, 308 F. Supp.2d 1230 (D. Colo. 2003), the only two other reported cases in the country addressing the application of *Ayers* to a claim for aggravation of a pre-existing condition. In *Rust*, the defendant believed that plaintiff's injuries were caused in part by a "pre-existing degenerative medical condition." 308 F. Supp.2d at 1230.

Plaintiff filed a motion in limine to exclude evidence of this condition, arguing that it was inadmissible under *Ayers*. The district court rejected this argument, finding that "*Ayers* is by no means dispositive." 308 F. Supp.2d at 1231.

Nichols' assertion that the decision below conflicts with cases from various other states does not withstand analysis. For example, Nichols asserts that the Alabama Supreme Court in *Norfolk Southern Railway Co. v. Bradley*, 772 So.2d 1147 (Ala. 2000) advised against instructing the jury in FELA cases regarding the apportionment of damages to a pre-existing condition because to do so would confuse the jury. (Petition at 22). To the contrary, *Bradley* affirmed the trial court's rejection of the defendant's tendered instruction because *it* was confusing and misleading. 772 So.2d at 1152.

Nichols' reliance on *Worthy v. Norfolk and Western Railway Co.*, 619 N.E.2d 1371 (Ill. App. 1993) is equally misplaced. The Illinois Court of Appeals in *Worthy* rejected the railroad's tendered jury instructions on apportionment of damages to a preexisting condition, concluding that the Illinois pattern instruction sufficiently addressed the issue. 619 N.E.2d at 1374-1376. Nine years later, the Illinois Supreme Court in *Schultz v. Northeast Illinois Regional Commuter Railroad Corp.*, 775 N.E.2d 964 (Ill. 2002) soundly criticized *Worthy*, explaining that the Illinois pattern instruction was misleading and did not follow FELA law. 775 N.E.2d at 974-977.

Nor does *Hager v. Norfolk & Western Railway Co.*, 2006 WL 3634373 (Ohio App. 2006) support Nichols' argument. The holding in *Hager* was based in large part on the order in which the apportionment questions were submitted to the jury. 2006 WL 3634373 at *8. Nichols here failed to object to the order in which the questions were submitted to the jury, as the Colorado Court of Appeals noted. (Pet. App. at 12a).

III. NICHOLS MAY NOT NOW CHALLENGE THE WORDING OF THE VERDICT FORM.

Throughout the Petition, Nichols insinuates that the verdict form is confusing. (Petition at i, 9, 16, 23 n.8). The wording of the verdict form used in this case is not a matter of national importance. As the Court of Appeals noted, the verdict form is not to be used as a model in future cases. (Pet. App. at 14a). Nichols' shadow argument also comes too late.

Under Colorado law, parties "shall make *all* objections" to the instructions before they are given to the jury, and "*only* the grounds so specified shall be considered on motion for a new trial or on appeal . . ." Rule 51, C.R.C.P., emphasis added; *Ross v. Colorado National Bank*, 170 Colo. 436, 463 P.2d 882, 885 (1969). Objections to the instructions must be both contemporaneous and specific. *Mallett v. Pirkey*, 171 Colo. 271, 466 P.2d 466, 473-474 (1970). The same rules apply to verdict forms. *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315, 1329-1330 (Colo. 1997). Federal law is similar. Rule 51(c)(1), F.R.C.P. ("A party who objects to an instruction . . . must do so on the record, stating distinctly the matter objected to and the grounds of the objection"); *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 189 (1st Cir. 1996), *cert. denied* 519 U.S. 927 (1996) (". . . the grounds for objection must be stated 'distinctly' after the charge to give the judge an opportunity to correct his . . . error") (hereafter "*Coastal Fuels*").

These principles bar consideration of Nichols' arguments concerning the language of the verdict form. Nichols objected to the use of "Special Verdict Form B" primarily (indeed, almost exclusively) on the erroneous ground that FELA does

not allow the apportionment of damages to a pre-existing condition. (Pet. App. at 28a; Tr. 9/18 at 42:17-43:7). Nichols did *not* object to the verdict form, *before* the jury was instructed, on the grounds that Questions 7 and 8 were poorly worded or confusing.

Further, a party may not argue on appeal that the jury's responses to interrogatories are inconsistent unless that argument was made in the trial court *before the jury was discharged. Masure v. Donnelly*, 962 F.2d 128, 135 (1st Cir. 1992); *Lewis v. Cowen*, 979 F. Supp. 99, 105-106 (D. Conn. 1997), *rev'd on other grounds* at 165 F.3d 154 (2d Cir. 1999); *Grant v. Westinghouse Electric Corp.*, 877 F. Supp. 806, 813-814 (E.D.N.Y. 1995). Failure to make a timely objection deprives the trial court of the most efficient means of resolving the problem: simply asking the jury to explain their answers. *Haskell v. Kaman Corp.*, 743 F.2d 113, 123 (2d Cir. 1984); *Blissett v. Eisensmidt*, 940 F. Supp. 449, 454 (N.D.N.Y. 1996).

The same rule applies to claims that the jury's answers are redundant, duplicative or ambiguous. *Greenway v. Buffalo Hilton Hotel*, 951 F. Supp. 1039, 1065-1066 (W.D.N.Y. 1997), *aff'd at* 143 F.3d 47 (2nd Cir. 1998); *Bseirani v. Mahshie*, 881 F. Supp. 778, 784-785 (N.D.N.Y. 1995), *aff'd at* 107 F.3d 2 (2nd Cir. 1997); *United States Football League v. National Football League*, 842 F.2d 1335, 1367 (2d Cir. 1988); *Coastal Fuels* at 201-202. Thus, Nichols waived his argument that the jury's answers to questions on the verdict form are "superfluous" or "immaterial." (*See* Petition at 17, 20).

Nichols here did not object to the jury's answers on the special verdict form until *after* the jury had been discharged.

His failure to make a timely objection deprived the trial court of the most efficient means of resolving the problem which Nichols now asserts. As a result, Nichols "has constructed his [appellate] argument to traverse a narrow path," as noted by the Court of Appeals. (Pet. App. at 10a). The Petition's constitutional rumblings notwithstanding, that "narrow path" never touched the Seventh Amendment.

Nichols *never* argued in the trial court or the Court of Appeals that the questions on the verdict form, or the court's enforcement of the jury's answers to those questions, deprived him of a jury trial in violation of the Seventh Amendment. In fact, Nichols never even *mentioned* the Seventh Amendment until seeking review in the Colorado Supreme Court. Not surprisingly, that court declined the invitation to consider a constitutional issue which had not been raised below. This Court follows the same wise practice. *Ellis v. Dixon*, 349 U.S. 458, 459, 460, 464 (1955); *International Brotherhood of Teamsters v. Denver Milk Producers*, 334 U.S. 809 (1948).

The only argument which Nichols did preserve is his generic assertion that no question regarding the apportionment of damages to a pre-existing condition should have been submitted to the jury. (Pet. App. at 28a). As noted, however, the railroad in a FELA case is not liable for damages caused by a pre-existing condition. Further, under both Colorado and Federal law, the district court has wide discretion to decide whether to use special verdict forms. Rule 49, F.R.C.P.; Rule 49, F.R.C.P.; *TransAmerica Premier Insurance Co. v. Ober*, 107 F.3d 925, 933 (1st Cir. 1997); *Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.*, 41 F.3d 182, 191 (4th Cir. 1994) (hereafter "*Bristol Steel*"). The value of using special verdict forms is well recognized. *Ayers* at 159; *O'Malley* at § 8:3, pp. 836-837.

Moreover, *asking* the jury a question regarding the apportionment of damages to a pre-existing condition could cause Nichols no harm so long as the jury's intent is reflected in the judgment. No purpose would be served by issuing a writ to review a discretionary decision which was at most harmless error. *See* Rule 61, F.R.C.P.; *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) ("... it is well settled that the appellate courts should act in accordance with the salutary policy embodied in Rule 61"); 28 U.S.C § 2111.

The crux of Nichols' argument is his assertion that the district court misinterpreted the jury's intent when entering judgment. This argument in turn rests upon Nichols' unfounded belief that the jury intended nothing by their response to Question 8. Notwithstanding his submission of this argument to *eleven judges* (the judge of the District Court for the City and County of Denver who presided over the trial; the three judges on the panel of the Colorado Court of Appeals who issued the decision under review; and the seven justices of the Colorado Supreme Court who denied Nichols' petition for writ of certiorari), *not one* has accepted it. Both the trial court and the Court of Appeals found that the judgment reflects the jury's intent, and the Colorado Supreme Court saw no reason to disagree with this conclusion.

IV. BOTH THE TRIAL COURT AND THE COURT OF APPEALS PROPERLY GAVE EFFECT TO *ALL* OF THE ANSWERS ON THE VERDICT FORM.

Nichols' assertion that the courts below failed to reconcile the jury's answers to the questions asked on the special verdict form is flatly contradicted by the record. The trial court reviewed the jury's answers to *all* of the questions

submitted and rejected Nichols' argument, finding that "To apply the construction proffered by Plaintiff necessarily ignores the jury's complete findings in this case, namely that plaintiff was contributorily negligent *and* that his injuries complained of were primarily pre-existing the date of the accident." (Pet. App. at 2a, emphasis in original). The Court of Appeals first correctly observed that "On appeal, we must attempt to reconcile a jury's answers to special verdict questions if we can do so based on the evidence and the instructions given." (Pet. App. at 15a). Then, after reviewing *all* of the jury's answers, the Court of Appeals rejected Nichols' argument "that the jury may have arrived at the $800,000 figure after determining the extent to which his losses were caused only by the aggravation of his pre-existing condition." (*Id.* at 16a). Both courts applied the correct standard and followed the correct procedure; they simply disagreed with Nichols' argument.

Nichols argues that the jury's responses to Questions 7 and 8 are "immaterial" or "necessarily subsumed" within their answer to Question 6. (Petition at 17). From this premise, Nichols concludes that both the trial court and the Court of Appeals erred in giving force to these "immaterial" answers to "superfluous question[s]" which "merely sought clarification of the jury's thought process." (*Id.* at 17, 20 n.7). This argument should be rejected for several reasons.

First, under Colorado law, a verdict should be construed, if at all possible, in such manner as to make it *effective* rather than *void*. *Boynton v. Fox Denver Theaters*, 121 Colo. 227, 214 P.2d 793, 795 (1950); *Tyler v. District Court*, 613 P.2d 899, 901 (Colo. 1980). Similarly, under federal law, the court should strive to *harmonize*, rather than *nullify*, the jury's answers to questions submitted. *Jewell v. Holzer Hospital*

Foundation, 899 F.2d 1507, 1510 (6th Cir. 1990); *Theurer v. Holland Furnace Co.*, 124 F.2d 494, 498 (10th Cir. 1991). Nichols' interpretation of the verdict form, which renders the answers to Questions 7 and 8 "superfluous" and "immaterial," violates these fundamental rules.

Second, Nichols' argument disregards the court's duty when confronted with allegedly inconsistent verdicts. As the court below recognized, an appellate court must reconcile the jury's answers to special verdicts, if possible. (Pet. App. at 15a). Special verdicts will not be set aside as inconsistent if the record discloses any evidentiary basis to support them. *City of Aurora v. Loveless*, 639 P.2d 1061, 1063 (Colo. 1981); *Alzado v. Blinder, Robinson & Co.*, 752 P.2d 544, 554 (Colo. 1988). The court must examine the record and determine whether competent evidence supports the verdicts. *Loveless* at 1063. Federal courts follow the same procedure. *Bristol Steel* at 190 ("The answers to special verdicts should be reconciled under any rational theory consistent with the evidence, and equally the answers should be harmonized if possible"); *Jewell* at 1510 (". . . federal law favors upholding the verdict if there exists some legal basis, supported by the evidence, upon which the verdict could be based"); *Theurer* at 498 (court should strive to reconcile special verdicts "on any reasonable theory consistent with the evidence and its fair inferences"); *Grant* at 810 (". . . the Court should approach the record with the goal of trying to harmonize what is claimed to be an inconsistent verdict. * * * That inquiry must be made within the context of both the factual record and the Court's charge").

Under these principles, Nichols' argument that the jury's responses to Questions 7 and 8 are "superfluous" or "immaterial" must be rejected. The record contains competent

evidence from which the jury could determine that the major portion of Nichols' claimed damages were attributable to pre-existing conditions in his knees and lower back. Long before the accident, Nichols had bipartite patella in his knees, and degenerative disk disease, Schorl's nodes and osteophyte formation in his spine and lower back. Contrary to Nichols' assertion that these conditions were "latent" and "asymptomatic," these conditions were progressive, noticeable and painful *before* the accident. (Petition at 1, 7; *see* Section A *under* Statement of Facts *supra*).

Further, at trial, Dr. Brucker could say only that the damage to Nichols' knee was caused "at least in part" by the accident. (Brucker Dep. at 24:15-25:7; 36:3-6). Similarly, Dr. Kenneth Danylchuk, another of Nichols' treating physicians, was unable to say whether Nichols' low back pain was caused by the accident or by the degenerative changes and Schmorl's nodes in his back. (Tr. 9/16 at 18:13 – 19:15). Asked whether the medical treatments for Nichols' lower back were made necessary by the accident, Dr. Danylchuk could only say the treatments were "at least in part directly related to" the accident. (*Id.* at 31:21 – 32:24). The tepid comments by these doctors that the damage to Nichols' knee and medical treatments for his lower back were caused by, or related to, the accident "*at least in part*" support the countervailing inference that these items of damage were *primarily* caused by, or related to, the pre-existing conditions in his knees and lower back.

Starting with the erroneous premise that the jury intended nothing by their responses to Questions 7 and 8, Nichols asserts that their answer to Question 6 is the only finding regarding damages. (Petition at 8). But that is the wrong starting point. The court must first determine if the jury's

responses to the questions on the verdict form are supported by the evidence. *Loveless* at 1063; *Alzado* at 554; *Bristol Steel* at 190; *Jewell* at 1510; *Theurer* at 498; *Grant* at 810. Because the jury's answers to *all* of the questions on the verdict form are supported by the evidence, the Court of Appeals correctly affirmed the trial court's entry of judgment in accordance with *all* of these answers.

Nichols' reliance on *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963), is misplaced. The trial court in *Gallick* entered judgment for the employee on the jury's special verdict; the Ohio Court of Appeals then set aside the judgment and verdict as contrary to the evidence. *Id.* at 108, 112-113. This Court reversed the ruling of the Ohio Court of Appeals and reinstated the original judgment because the jury's special verdict was supported by the evidence. *Id.* at 113-114 ("We hold that the record shows sufficient evidence to warrant the jury's conclusion that petitioner's injuries were caused by the acts or omissions of respondent. * * * Under the ruling cases in this Court the evidence presented was sufficient to raise an issue for the jury's determination . . ."). In the present case, the trial court entered judgment on the basis of the jury's special verdict, and the Court of Appeals *affirmed* that judgment because the verdict *is supported* by the evidence. Unlike the situation in *Gallick*, Nichols would have this Court set aside the judgment entered by the trial court and affirmed by the Court of Appeals on the unspoken grounds that it is not supported by the evidence.

V. NICHOLS' VARIOUS ARGUMENTS OVERLOOK THE INSTRUCTIONS AND/OR THE EVIDENCE.

Nichols argues that the jury excluded damages attributable to pre-existing conditions when awarding him $800,000, because Instruction No. 28 directed the jury "to determine, if possible, the amount of damages . . . caused only the negligence of the Defendant" and explained that Nichols "is entitled to recover damages caused only by the negligence of the Defendant." (Petition at 1; Pet. App. at 52a; Pld. 5 at p.1371; Tr. 9/18 at 70:20 – 71:17). This argument overlooks the basic principle that, under both Colorado and federal law, the instructions and verdict forms should be read as a whole. *Montgomery Ward & Co. v. Kerns*, 172 Colo. 59, 470 P.2d 34, 36-37 (1970); *Putnam Resources v. Pateman*, 958 F.2d 448, 455 (1st Cir. 1992) (". . . it is well established that verdicts must be construed in light of the totality of the circumstances, including the court's instructions"); *Halprin v. Mora*, 231 F.2d 197, 201 (3rd Cir. 1956); *McVey v. Phillips Petroleum Co.*, 288 F.2d 53, 59 (5th Cir. 1961).

Consistent with the language of FELA, the trial court instructed the jury that Nichols must prove that BNSF was negligent and that such negligence "was a 'legal cause' of damage sustained by the Plaintiff." (Pet. App. at 41a-45a; Pld. 5 at p. 1356; Tr. 9/18 at 62:21 – 63:11). The court also gave the jury the following explanation of "legal cause":

> For purposes of this action, negligence is a "legal cause" of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find from evidence in the case that any negligence of the

> Defendant contributed in any way toward any injury or damages suffered by the Plaintiff, you may find that such injury or damage was legally caused by the Defendant's act or omission.
>
> Negligence may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if such cause occurs at the same time as the negligence and if the negligence played any part, no matter how small, in causing such damage.

(Pet. App. at 42a-43a; Instruction No. 8; Pld.5 at p. 1351; Tr. 9/18 at 59:16 – 60:4). Reading Instructions 8, 13 and 28 together, the jury was instructed to determine the amount of damages caused by the negligence of BNSF; that negligence is a cause of damages under FELA if it is a "legal cause"; and that BNSF's negligence is a legal cause of damages if such negligence "operate[d] in combination with . . . some natural cause" and "played any part, no matter how small, in causing such damage."

Applying these instructions to the facts of this case, BNSF's negligence was a legal cause of damages if such negligence operated in combination with Nichols' pre-existing conditions in causing the claimed damages, and that negligence played any part, no matter how small, in causing those damages. Thus, the damages found by the jury could include amounts attributable to Nichols' pre-existing conditions, so long as BNSF's negligence operated in combination with those conditions to produce the total damages.

Nichols argues that the jury's response to Question 6 does not include any damages attributable to a pre-existing condition, because the jury was instructed to award damages only for injuries caused by the accident. (Petition at 1). This argument overlooks the fact that the phrase "the injury" in Question 6 is given meaning by Question 2, which refers to the "injuries, damages and losses *claimed* by the Plaintiff", and by Question 4, which refers to "his own *claimed* injuries". (Pet. App. at 4a-5a; emphasis added). Read in context, Question 6 therefore asks the jury to determine what amount would fairly and adequately compensate Nichols for the injuries he *claimed.*

Nichols *claimed* that his right knee and lower back hurt; that he would need surgery in his right knee; and that because of these problems he could no longer work as an engineer. The amount determined by the jury which would fairly compensate Nichols for the injuries he claimed therefore includes damages for the problems in his knees and lower back, problems which were in large part attributable to pre-existing conditions.

As the Court of Appeals noted, if the $800,000 award did not include damages attributable to Nichols' pre-existing conditions, then the jury must have found that Nichols' total damages exceeded $2.5 million. (Pet. App. at 16a). As the court further observed, however, the evidence could not support a damage award exceeding $1 million. (*Id.*). Nichols asserts that because his pre-existing conditions were latent and asymptomatic, the jury could not have included any damages for those pre-existing conditions in their answer to Question 6. (Petition at 1; Pet. App. at 67a). This assertion ignores the evidence regarding the patent, progressive and painful nature of Nichols' pre-existing conditions.

CONCLUSION

For the reasons stated above, BNSF respectfully requests that the Court deny Nichols' Petition for a Writ of Certiorari.

Respectfully submitted,

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